Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure

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INTRODUCTION

In recent years, in response to ever-increasing budget deficits, numerous politicians and commentators have argued that Congress should give the President greater powers to reduce federal spending through a variety of means, including the impoundment of funds.[1] While such arguments may initially seem attractive to those who wish to control or eliminate the deficit, they also have significant implications for the principle of separation of powers and the constitutional requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[2] In light of the continuing pressures to respond to the budget deficit, proposals for expanded executive impoundment are likely to continue. This Note examines the current state of the law relating to the presidential impoundment of funds and will argue that Congress should resist proposals to expand presidential impoundment powers. Instead, Congress should create additional tools to insure that the President does not unconstitutionally impound funds in the future.

Professor Kate Stith argues that there are two governing principles relating to the federal budget: (1) the Principle of the Public Fisc, which "assert[s] that all monies received from whatever source by any part of the government are public funds"[3] and (2) the Principle of Appropriations Control, which "prohibit[s] expenditure of any public money without legislative authorization."[4]

There is also arguably a third principle, which is the inverse of the Principle of Appropriations Control. This principle, which this Note calls the Principle of Appropriation Expenditure, requires the expenditure of all money that is

1. For the purposes of this Note, impoundment is defined as "[a]ny action or inaction by an officer or employee of the United States Government that precludes the obligation or expenditure of budget authority provided by Congress." GEN. ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 63 (3d ed. 1981).

2. U.S. CONST. art. I, § 9, cl. 7.

3. Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988).

4. *Id.*

appropriated by the Congress, unless Congress authorizes the executive to spend less than the full amount appropriated. In the language of the budget, this principle prohibits the executive branch from impounding funds unless authorized to do so by Congress. With limited exceptions,[5] the Principle of Appropriation Expenditure has been broadly accepted by those writing about impoundment and enforced by the courts.[6]

Through the years, Congress has realized that, in order to execute the laws most effectively, the President must be given some discretion in choosing whether to spend all the money that has been appropriated. The President has required a certain amount of flexibility to better (1) respond to changes in circumstances (such as the end of a war) and (2) realize operating efficiencies by fulfilling the goals that Congress had in mind when it made the appropriation while, at the same time, spending less money than Congress appropriated.

Congress has traditionally given such flexibility to the executive branch through two mechanisms. First, Congress has included specific language in particular authorization or appropriation bills which explicitly provides that the executive branch does not have to spend the full amount of the appropriation. Second, Congress has enacted a series of laws which establish a general framework for determining the circumstances and the procedures under which the President may impound funds.[7] The two primary acts which have established

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5. *See, e.g.*, Harner, *Presidential Power to Impound Appropriations for Defense and Foreign Relations*, 5 HARV. J.L. & PUB. POL'Y 131 (1982) (arguing that, under certain circumstances, President may impound appropriations for foreign relations). Several commentators and Presidents have argued that there is a constitutional exception to the Principle of Appropriation Expenditure in the area of foreign relations. This exception is said to derive from the Commander-in-Chief clause, U.S. CONST. art. 2, § 2, and the President's broad authority in overseeing foreign affairs. Courts have not yet addressed this issue.

In addition, there may be other areas where the President has an inherent Article II power to reduce expenditures. For example, the President arguably may choose to spend less than the full amount appropriated for White House staff. Or the President could theoretically reduce court and prison expenditures by a widespread exercise of his pardon power. Neither of these issues apprear to have been litigated.

6. From 1973 to 1975, in response to the impoundments of the Nixon Administration, there were over 30 law journal articles and notes addressing this issue. The articles were virtually unanimous in their view that, with the exception of the situations where Congress had explicitly granted the President the power to impound or where a foreign relations exception might exist, *see supra* note 5, impoundments are unconstitutional under the doctrine of separation of powers. More specifically, they argued that impoundments are unconstitutional based upon both the Article I provision that all appropriations are to be made by law and the Article II provision that the President shall "take care that the laws be faithfully executed." *See* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149 (1974); Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 615 (1974); Mills & Munselle, *Unimpoundment: Politics and the Courts in the Release of Impounded Funds*, 24 EMORY L.J. 313 (1975); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973).

7. Impoundments can be categorized in several ways. Expenditure of appropriations may be deferred (thus requiring only half-year funding, for example) or not undertaken at all. Several commentators have distinguished between routine impoundments, for efficiency reasons, and policy impoundments, for programmatic reasons. *See generally* Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413, 448-49 (1977) (discussing various categories of impoundment).

this general framework are the Anti-Deficiency Act[8] and the Impoundment Control Act of 1974 (ICA).[9]

This Note examines the enforcement of the Principle of Appropriation Expenditure.[10] Part I provides a brief history of impoundment control, as divided into two periods: prior to enactment of the ICA and subsequent to enactment of the ICA. Part II identifies two issues relating to the present and future effectiveness of the ICA as a tool for enforcing the Principle of Appropriation Expenditure: first, who has standing to sue under the ICA and second, current proposals in Congress to amend the ICA, which would have the effect of reducing congressional control over presidential impoundments. Part III evaluates the issues relating to standing and proposes amendments to the ICA to provide for better enforcement of the Principle of Appropriation Expenditure.

I. A BRIEF HISTORY OF IMPOUNDMENT

A. *Impoundment Prior to the ICA*

Presidential impoundment dates back at least to the administration of Thomas Jefferson.[11] In the years from the Jefferson Administration until the Nixon Administration, presidential impoundments were generally dealt with in one of two ways. First, Congress sometimes acquiesced in the impoundment. It makes little sense for Congress to challenge the executive when money is impounded because the original purpose of the appropriation no longer exists or because efficiencies can be achieved.

The second response was a political one directed at the President, either in the form of pressure from Congress or direct pressure from frustrated potential recipients of impounded funds. Congressional leaders and presidential staff would negotiate (either openly or behind the scenes) to reach an accommodation which would allow for a level or type of impoundment that was acceptable

8. 31 U.S.C. §§ 1341-42, 1349-51, 1511-57 (1988).

9. 2 U.S.C. §§ 681-88 (1988).

10. This Note focusses only on impoundments that are large or important enough to be noticed by Congress or those parties, such as local governments or interest groups, who had expected to receive the impounded funds.

As several commentators have pointed out, there appear to be numerous small-scale impoundments that occur within agency bureaucracies on a routine basis. Such impoundments are not reported to Congress, as required by the ICA, and are apparently not reported to the Office of Management and Budget either. It is such hidden impoundments, among other factors, that have led one commentator to call budget administration the "dark continent" of the federal budget process. Stith, *Rewriting the Fiscal Constitution: the Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 643 (1988) (citing *Oversight on the Impoundment Control Process: Hearing Before the Task Force on Enforcement, Credit, and Multiyear Budgeting of the House Comm. on the Budget*, 97th Cong., 2d Sess. 180 (1982) (statement of Professor Allen Schick)).

11. In 1803, Congress appropriated $50,000 for gunboats for use along the Mississippi River to protect against attacks from the French. The subsequent Louisiana Purchase made acquisition of the gunboats unnecessary, so Jefferson notified the Congress that he did not intend to spend the funds appropriated for that purpose. Not surprisingly, Congress did not object. L. FISHER, PRESIDENTIAL SPENDING POWER 150 (1975).

to Congress. Furthermore, at times the President would cave in to pressure from states, local units of government or special interest groups who might suffer if funds were impounded.[12]

The Nixon Administration changed the unwritten rules of the impoundment battle. First, President Nixon impounded in quantities far greater than had occurred during any previous administration. Second, Nixon defined policy impoundments very broadly, so that, for example, the need to control inflation was a sufficient reason to curb federal spending on a selective basis.[13] Finally, Nixon claimed a constitutional basis for all impoundments, including both routine and policy impoundments.[14]

Whereas under previous administrations Congress had been able to work out a political solution to conflicts with the President over impoundments, Congress was frequently unable to reach agreements with the Nixon Administration.[15] When the political response was no longer effective, a series of lawsuits arose, brought by frustrated potential recipients of funds that had been impounded by the President. Prior to passage of the ICA, courts generally found in favor of the frustrated potential recipient of funds.[16]

The Supreme Court has only once ruled in a case where a potential recipient of funds wanted to force the release of impounded funds. In *Train v. City of New York*,[17] the Court analyzed the issue as one of interpretation of the authorization statute.[18] The case involved an order from the President to the Admin-

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12. *See generally* Mills & Munselle, *supra* note 6, at 315-22 (discussing various forms of political pressure from potential recipients of funds).

13. *See generally* L. FISHER, *supra* note 11, at 175-97 (detailed discussion of Nixon's impoundment record).

14. Nixon cited the "executive power" clause. U.S. CONST. art. II, § 1. *See generally*, Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1513-16 (1973) (discussing Nixon's constitutional justifications for impoundment).

15. *See* L. FISHER, *supra* note 11, at 175-77 (discussing the inability of Congress to respond to Nixon impoundments which were "unprecedented in their scope and severity").

16. *See, e.g.*, State Highway Comm'n of Mo. v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689 (E.D. Va. 1973).

The courts followed a two-step logic in disallowing executive impoundments. First the courts made the constitutional argument that, based upon the principle of separation of powers and the duties of the legislative and executive branches, as embodied in the first two articles of the Constitution, the President could not impound funds without Congressional approval. Next, the courts interpreted the statute to determine legislative intent. If Congress intended to give impoundment power to the President, then such impoundments were constitutional and legal. Otherwise, they were not. This two step argument applies in the post-ICA period as well. After the ICA, Congress may give the President authority to impound either through a particular authorization or under the procedures established by the ICA. *See infra* text accompanying notes 28-36.

17. 420 U.S. 35 (1975).

18. Although this case was decided seven months after passage of the ICA, the Court ruled that the ICA did not apply here, because the first section of the ICA provided that, "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . (3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment." 2 U.S.C. § 681 (1988). The Court concluded that "[t]he Act would thus not appear to affect cases such as this one, pending on the date of enactment of the statute. . . . [N]o [other] issues as to the reach or coverage of the Impoundment Act [sic] are before us." *Train*, 420 U.S. at 42 n.8.

istrator of the Environmental Protection Agency (EPA) stipulating that each state receive less than the full amount that had been authorized under the Federal Water Pollution Control Act Amendments of 1972.[19] The Court ruled that the Act did not allow such a reduction in the allotments to the States, basing its conclusion upon its interpretation of the legislative intent in passing the Act.[20]

While the executive did not frame its argument in constitutional separation of powers terms, and the Court therefore did not base its ruling on such an argument, the issue is clearly lurking in the background, both in this case and in the general question of impoundment control. If the President had a constitutional power to impound funds without congressional approval, then legislative intent regarding the amount of the allotment would be irrelevant. The Court implied as much when it wrote: "The issue in this case is the extent of the authority of the Executive to control expenditures for a program that Congress has funded in the manner and under the circumstances present here."[21]

A more complete discussion of the various statutory issues relating to impoundment prior to the passage of the ICA can be found in *State Highway Commission of Missouri v. Volpe*.[22] In this case, the President sought to withhold highway trust funds in order to fight inflation and the State Highway Commission of Missouri sued, arguing that the authorization statute did not allow such withholdings. The court explicitly held that "[r]esolution of the issue before us does not involve analysis of the Executive's constitutional powers" because the government did not make the argument here that there was a constitutional right to impound funds.[23] The court then went on to rule that the issue was strictly one of statutory construction and that Congress had indeed mandated the spending of the funds.[24]

The court next ruled on the applicability of the Anti-Deficiency Act.[25] This law, which was later amended by the ICA, allowed the executive branch to establish reserves, for the purpose of withholding funds, to "provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available."[26] The court ruled that the legislative history made clear that this language would not allow the impoundment of funds for policy reasons. The court found that

19. Pub. L. No. 92-500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1252-68 (1988)).
20. *Train*, 420 U.S. at 41-49.
21. *Id.* at 39 n.2.
22. 479 F.2d 1099 (8th Cir. 1973).
23. *Id.* at 1106.
24. *Id.* at 1107.
25. 31 U.S.C. § 665(c) (current version at 31 U.S.C. § 1511 (1988)).
26. *Volpe*, 479 F.2d at 1118 (citing the Anti-Deficiency Act, 31 U.S.C. § 665(c) (current version at 31 U.S.C. § 1511 (1988)).

the executive branch could not impound funds so as to jeopardize the objectives of the appropriation statute.

The *Volpe* court thus noted the existence of three possible justifications for impoundment. The first was a constitutional justification, on which the court did not rule. The second justification was based on an interpretation of the particular authorization statute. The court rejected this justification in light of legislative history and statutory construction. The court also rejected the third justification, which was based upon the Anti-Deficiency Act.

While neither the Supreme Court nor appellate courts have ruled on constitutional separation of powers justifications for executive impoundment, various district courts have done so.[27] Each court has found executive impoundment, without the approval of Congress, to be unconstitutional.

In sum, during the pre-ICA period, courts examined three types of justifications for executive impoundment and found each unconvincing. Courts rejected justifications based upon (1) implied constitutional powers, (2) the Anti-Deficiency Act and (3) provisions of specific budget authorization statutes.

B. *Impoundment After the ICA*

The ICA, which was enacted as Title X of the Congressional Budget and Impoundment Control Act of 1974,[28] established a new set of tools which Congress could use to monitor and, if necessary, prevent presidential impoundments. This section discusses the ICA and how the three branches of government have interpreted and responded to its provisions.

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27. *Lousiana* ex rel. *Guste v. Brinegar*, 388 F. Supp. 1319 (D.D.C. 1975), for example, raised the same highway funds issue as had *Volpe*. After determining that neither the authorization act nor the Anti-Deficiency Act allowed the impoundments, the court turned to the government's final argument that "the President's express or implied constitutional powers justify holding back authorized funds." *Id.* at 1324.

The court noted first that this argument had been rejected by numerous other district courts. *Id.* at 1324-25 & n.13 (citing Guadamuz v. Ash, 368 F. Supp. 1233, 1243-44 (D.D.C. 1973); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 77 (D.D.C. 1973)). The court then argued that "the vesting of '[t]he executive Power' in the President and the requirement to 'take Care that the Laws be faithfully executed' are hardly grants of legislative power." *Id.* at 1325 (footnotes omitted). As general support for this argument, the court cited *Kendall v. United States* ex rel. *Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution and entirely impermissible."), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) ("The Constitution [does] not subject [the] lawmaking power of Congress to presidential . . . supervision or control. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."), in arguing that the President has no power to refuse to execute the laws or make new laws without the consent of the legislature.

The court next considered the executive branch's argument that it was "uniquely suited to render timely, swift and integrated fiscal and economic decisions—in contrast to the cumbersome committee, hearing and floor debate process through which Congress works its will." *Louisiana* ex rel. *Guste*, 388 F. Supp. at 1325. The court responded by noting that "[n]owhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise." *Id.* at 1325 (quoting Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973)).

28. Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

1. *Provisions of the ICA as Enacted in 1974*

The ICA created two categories of impoundment and established the conditions under which the President could undertake each category of impoundment.[29] In addition, the ICA created two roles for the Comptroller General. First, the Comptroller General is to submit a report in cases where the executive branch has (a) impounded funds without submitting a special message to the Congress or (b) incorrectly classified a proposed impoundment (i.e., calling a proposed rescission a deferral or vice versa).[30] Second, the Comptroller General is empowered to bring suit against the executive branch to force the release of impounded funds in cases where the executive branch had illegally impounded funds by not following the procedures and restrictions on such activity as embodied in the ICA.[31]

2. *The ICA After Codification of* New Haven

No impoundment case has reached the Supreme Court since *Train* and thus the Court has not ruled on any aspect of the ICA. However, the Court of Appeals for the District of Columbia Circuit has twice ruled on issues relating to the ICA.

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29. The first category is "rescission," whereby the President, with the approval of Congress, can cancel budget authority previously provided by Congress. In order to rescind funds, the President must transmit a special message to Congress outlining the reasons for, and the impact of, the rescission. If Congress wishes, it may then respond to the special message by passing a rescission bill, which rescinds, in whole or in part, the budget authority. If Congress does not so act within forty-five calendar days of the message, then the President must release the funds. 2 U.S.C. § 683 (1988).

The second category of impoundment created by the ICA is "deferral," which is defined in the ICA as:

> (A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or
> (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.

2 U.S.C. § 682 (1988).

The 1974 version of the ICA contained deferral reporting requirements similar to those for proposed rescissions, but allowed unilateral executive deferrals unless either house of Congress passed an impoundment resolution disapproving such deferral. Pub. L. No. 93-344, § 1013, 88 Stat. 334 (1974) (amended 1987). This provision was later found unconstitutional in City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987), in light of INS v. Chadha, 462 U.S. 919 (1983). *See infra* notes 32-36 and accompanying text.

30. 2 U.S.C. § 686 (1988).

31. 2 U.S.C. § 687 (1988). While the ICA did not explicitly require the Comptroller General to obtain the approval of Congress before bringing suit, it did stipulate that:

> [n]o civil action shall be brought by the Comptroller General under this [Act] until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

Id. This language clearly implies that the Comptroller General is to consult with the Congressional leadership before bringing a suit.

In *City of New Haven v. United States*,[32] the court found the deferral section of the ICA to be unconstitutional, under *INS v. Chadha*,[33] because it contained a legislative veto. The *New Haven* court found the entire section of the ICA dealing with deferrals to be invalid, because the unconstitutional legislative veto section of the Act was not severable from the rest of the deferral section.[34] As a result of the court's ruling, the ICA applied only to rescissions, or permanent impoundments. The court ruled that deferrals would be governed by the Anti-Deficiency Act.[35] Within nine months Congress amended the ICA to codify the *New Haven* court's ruling.[36]

3. *Standing to Sue Under the ICA*

No court has explicitly held that the ICA creates a private right of action, although one appellate court has permitted a private suit under the ICA. In *West Central Missouri Rural Development Corp. v. Donovan*,[37] appellants challenged a presidential deferral under the ICA. The court ruled against the appellants on the question of whether the deferral was valid under the ICA but, significantly, did not rule that they lacked standing.[38]

However, two district courts have ruled that the ICA does not create a private right of action. In *Public Citizen v. Stockman*,[39] the plaintiffs, who represented private potential recipients of funds, claimed that impoundments that the President had classified under the ICA as deferrals were, in fact, rescissions. The Comptroller General did not report any violation of the ICA to Congress and indicated no intention of bringing suit in federal court to force release of impounded funds.

The court, ruling that the ICA had created no private right of action, denied the plaintiff's request for a preliminary injunction. It ruled that, based upon

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32. 809 F.2d 900 (D.C. Cir. 1987). In addition to *New Haven*, the Court of Appeals for the District of Columbia also decided *West Central Missouri Rural Development Corp. v. Donovan*, 659 F.2d 199 (D.C. Cir. 1981). The court held that the President's deferral was valid under the provisions of the ICA. *See infra* notes 37-38 and accompanying text. No other appellate court appears to have ruled on issues relating to the ICA.

33. 462 U.S. 919 (1983).

34. *City of New Haven*, 809 F.2d at 902.

35. *Id.* at 909.

36. The new section on deferrals contained the same executive reporting requirements for deferrals, but provided that:

> Deferrals shall be permissible only—
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> (1) to provide for contingencies;
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> (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
>
> (3) as specifically provided by law.
>
> No officer or employee of the United States may defer any budget authority for any other purpose.

Pub. L. No. 100-119, § 206, 101 Stat. 785 (1987).

37. 659 F.2d 199 (D.C. Cir. 1981) (per curiam).

38. The court did not address the issue of standing at all in its opinion.

39. 528 F. Supp. 824 (D.D.C. 1981).

legislative history and statutory construction, only the Comptroller General could bring a suit under the ICA contending that an impoundment was improperly classified.[40]

While courts have held that frustrated potential recipients of funds (including individuals and public interest groups, as well as state and local governments) may not bring suit to force the release of impounded funds under the ICA, no such case has been decided in a suit brought by the one party specifically permitted, by the terms of the ICA, to bring such suits: the Comptroller General. However, President Reagan has suggested that the Comptroller General may not bring suit under the ICA either, for constitutional reasons.[41]

4. *Successful Suits Forcing Release of Impounded Funds*

When executive impoundment of funds occurs, it is possible to force release of impounded funds, through the courts, without relying on the ICA. Thus, frustrated potential recipients of funds, who lack standing under the ICA, may still, under certain circumstances, be able to force release of impounded funds, by relying on the specific authorization or appropriation statutes themselves.

In *National Association of Counties v. Baker*,[42] for example, plaintiffs[43] sought declaratory and injunctive relief to force the executive branch to release funds that Congress had appropriated under the State and Local Government Fiscal Assistance Act of 1972[44] but that the executive branch subsequently had sequestered under the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman).[45] The court required the disbursement of the funds, but did not once mention the ICA. The court evaluated the specific language and legislative intent of the appropriate authorization statutes and Gramm-Rudman and found that the defendant had improperly refused to release the funds. The court wrote that the executive "can refuse to expend funds appropriated by Congress only where spending discretion has been expressly conferred by Congress itself—in the provisions establishing a given program, in the

40. *Id.* at 827-28. Similarly, in *Rocky Ford Housing Authority v. United States Department of Agriculture*, 427 F. Supp. 118 (D.D.C. 1977), the district court considered whether individuals could bring a claim in situations where the executive had failed to report an impoundment to Congress. The court ruled that Congress did not intend for the ICA to create a private right of action in such cases, but that the Comptroller General, with the tacit approval of Congress, could bring such suits. *Id.* at 134.

41. *See infra* text accompanying notes 56-58.

42. 669 F. Supp. 518 (D.D.C. 1987).

43. The National Association of Counties, National League of Cities, United States Conference of Mayors, and ten individual cities and counties were plaintiffs. *Id.* at 519.

44. Pub. L. No. 92-512, 86 Stat. 919 (1972), *repealed by* Pub. L. No. 99-272, § 14001(a)(1), 100 Stat. 327 (1986).

45. Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

relevant spending statutes, or in some other provision of law."[46]

One court has interpreted the first section of the ICA, which reads in relevant part, "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."[47] In *Dabney v. Reagan*,[48] a collection of individuals, cities, states, public interest groups and members of Congress brought suit against the executive branch seeking the release of funds from the Solar Energy and Energy Conservation Bank. President Reagan submitted a formal rescission proposal to Congress, but Congress did not act on it within the statutorily required forty-five days.

The court, in requiring the expeditious release of the funds, ruled that, because there was no deferral or rescission message pending under the ICA at the time of the suit, it was not necessary to determine whether the ICA applied to the Solar Energy and Energy Conservation Bank Act.[49]

Thus, while two courts have found that frustrated potential recipients of funds do not have standing under the ICA,[50] other courts continue to find standing in suits brought outside the ICA to challenge impoundment. Such courts have granted standing to sue to enforce a specific authorization statute.

5. *Executive-Congressional Interaction Under the ICA*

The executive branch has two responsibilities under the ICA. First, the executive must transmit a special message to Congress whenever it proposes to rescind or defer funding.[51] Second, it may only execute the proposed impoundment if the conditions of the ICA (and any other statutory provision appropriate for that particular impoundment) are met.

The Comptroller General has found few situations since passage of the ICA where the executive branch has not reported an impoundment.[52] In addition,

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46. 669 F. Supp. at 523. The court cited Train v. City of New York, 420 U.S. 35, 44-48 (1975); City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987); and State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), for this assertion.

47. 2 U.S.C. § 681 (1988).

48. 542 F. Supp. 756 (S.D.N.Y. 1982).

49. In a footnote, however, the court wrote that, because the Solar Energy and Energy Conservation Bank Act mandated that funds be made available during FY 1982, there was "authority for the proposition that" the Impoundment Control Act could not operate to affect that result. *Id.* at 767 n.3 (citing Maine v. Goldschmidt, 494 F. Supp. 93 (D. Me. 1980)).

50. *See supra* notes 39-40 and accompanying text.

51. Theoretically, the executive could try to circumvent the reporting requirement in two ways. First, the executive could simply not report the rescission or deferral. Second, the executive could misclassify the impoundment, by calling a rescission a deferral or vice versa.

52. From the effective date of the ICA to March 20, 1986, the executive branch reported 1277 deferrals and proposed 798 rescissions. The Comptroller General identified fifteen additional unreported deferrals and six additional unreported rescissions, or 1.2% and 0.7% of total deferrals and rescissions, respectively. *See The Deferral Process as Provided by the Congressional Budget and Impoundment Control Act of 1974: Hearings Before the House Comm. on Rules*, 99th Cong., 2d Sess. 147 (1986) (statement of Milton J.

the Comptroller General has not had to reclassify deferrals as rescissions or vice versa with any degree of regularity.[53]

With respect to the release of deferred funds, a Special Assistant to the Comptroller General has testified that the Comptroller General's "monitoring experience and a review of the record indicate no pattern or practice of refusal or failure to release deferred funds in a timely manner."[54]

The number and amount of rescissions proposed and the congressional disapproval rates have varied considerably since the passage of the ICA. The statistics follow, with amounts in millions of dollars:[55]

	Rescissions Proposed		*Rescissions Rejected*		*Percent Disapproved*	
	Number	Amount	Number	Amount	Number	Amount
Ford:	154	$8,579	97	$6,078	63%	71%
Carter:	132	$6,746	38	$2,078	29%	31%
Reagan (first two years):	165	$23,269	54	$7,016	33%	30%
Reagan (last six years):	430	$20,011	325	$19,611	76%	98%

Not surprisingly, the proposal and rejection rate of rescissions is primarily a function of whether the Presidency and Congress are controlled by the same political party. When the Congress and President shared the same party affiliation during the Carter years, the average number of rescissions proposed each year was lower, as was the congressional rejection rate. During the early years of the Reagan presidency, the congressional rejection rate was nearly the same as during the Carter years, presumably because of the perceived Reagan mandate and the Republican control of the Senate. However, for the remainder of the Reagan Presidency, Congress rejected over ninety percent of the dollar amount of proposed rescissions each year.

II. Challenges to the Use of the ICA as a Tool for Enforcing the Principle of Appropriation Expenditure

While the ICA appears to have been effective thus far in curbing the abuses of impoundment that occurred during the Nixon Administration, some commentators suggest it limits who has standing in the courts to enforce the Principle of Appropriation Expenditure. Other commentators suggest the ICA should be amended to give the President greater impoundment power.

Socolar, Special Assistant to the Comptroller General).

53. From the effective date of the ICA to March 20, 1986, the Comptroller General reclassified eight deferrals as rescissions (seven of these were in the first year following passage of the ICA) and reclassified one rescission proposal as a deferral. *Id.* at 146.

54. *Id.* at 138.

55. V. McMurtry, Rescissions by the President Since 1974: Background and Proposals for Change 10 (Congressional Research Service Report No. 89-271GOV, 1989).

This Part briefly outlines the various challenges to the use of the ICA as a tool for enforcing the Principle of Appropriation Expenditure.

A. *Standing to Sue Under the ICA*

When, in 1987, Congress amended the ICA to remove the legislative veto for deferrals, it included, in section 206(c), language which provided that "Sections 1015 and 1016 of the Impoundment Control Act of 1974 are reaffirmed."[56] Section 1015 provides for reports by the Comptroller General and section 1016 provides for suits by the Comptroller General to cause the executive branch to make budget authority available for obligation.

In his signing statement for the amendments to the ICA, President Reagan contended that:

> the Supreme Court's recent decision in *Bowsher v. Synar*[57] . . . makes clear that the Comptroller General cannot be assigned executive authority by the Congress. In light of this decision, section 206(c) of the joint resolution, which purports to "reaffirm" the power of the Comptroller General to sue the Executive branch under the Impoundment Control Act, is unconstitutional. It is only on the understanding that section 206(c) is clearly severable from the rest of the joint resolution, . . . that I am signing the joint resolution with this constitutional defect.[58]

President Reagan thus denied that the Comptroller General can sue to enforce the Principle of Appropriation Expenditure.

In addition, as discussed *supra* in section I.B.3., several district courts have ruled that the provisions of the ICA implicitly bar parties other than the Comptroller General from bringing suit under the ICA to force executive reporting or release of impounded funds.

If *both* the Comptroller General and frustrated potential recipients of funds are barred from bringing suit under the ICA, then the statute has lost virtually all of its usefulness as a tool for enforcing the Principle of Appropriation Expenditure.

B. *Proposals for Enhanced and Expedited Rescission Authority*

As a result of pressures to reduce the deficit, Presidents Reagan and Bush as well as some members of Congress have sought to increase the President's impoundment powers. This effort has focused on two proposed changes to the current impoundment process: enhanced rescission and expedited rescission.

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56. Pub. L. No. 100-119, § 206(c), 101 Stat. 785, 786 (1987).

57. 478 U.S. 714 (1986).

58. Statement on Signing H.R.J. Res. 324 into Law, 23 WEEKLY COMP. PRES. DOC. 1091 (Oct. 5, 1987) (case citation added).

1. *Enhanced Rescission*

Enhanced rescission, in its most extreme form, would allow a rescission proposed by the President to take effect unless both houses of Congress were to pass legislation disallowing the rescission and the President were to sign the legislation. If the President were to veto the legislation, then Congress could override the veto by a two-thirds vote. Proponents of enhanced rescission argue that it would give the President greater control over spending, thus providing an important tool for reducing the federal budget deficit.

A number of bills have been introduced in Congress in recent years to provide for various forms of enhanced rescission.[59] Not surprisingly, most recent congressional supporters of enhanced rescission authority have been members of the President's party.[60]

Many argue that this form of rescission would give the President a statutory line-item veto.[61] However, enhanced rescission is clearly a more powerful tool for the executive branch than the line-item veto.[62] In addition, enhanced rescission would require Congress to approve spending three times: (1) at the original passage of the appropriation; (2) in disapproving the proposed rescission; and (3) in overriding, by a two-thirds vote, a presidential veto of the disapproval of the proposed rescission. The existence of these last two "approval steps" puts the President in a much stronger position and would effectively, and perhaps unconstitutionally,[63] shift control over spending levels from Congress to the President. Enhanced rescission would largely undermine Congress' control over federal spending and thus greatly limit its ability to enforce the Principle of Appropriation Expenditure.

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59. V. MCMURTRY, *supra* note 55, at 20-23. These include H.R. 33, 100th Cong., 1st Sess. (1987); H.R. 1685, 100th Cong., 1st Sess. (1987); S. 401, 100th Cong., 1st Sess. (1987); H.R. 808, 101st Cong., 1st Sess. (1989); H.R. 1053, 101st Cong., 1st Sess. (1989); S. 155, 101st Cong., 1st Sess. (1989).

60. V. MCMURTRY, *supra* note 55, at 20-23.

61. It has been argued that statutorily providing the President with either a line-item veto or general impoundment power is unconstitutional because it would strip Congress of its constitutionally assigned spending power. Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838 (1987). Under this rationale, enhanced rescission is also unconstitutional.

62. The President's Cabinet Council on Economic Affairs recognized as much when it wrote in a memorandum to President Reagan:

> Enhanced rescission authority could be enacted quickly, builds on existing law, and does not require the lengthy process for amending the Constitution.
>
> Rescission authority can be exercised at any time and for less than the total budget authority appropriated for a particular purpose. Most line item veto provisions require vetoing all budget authority for an item and must be exercised at the time the appropriations bill is presented for the Chief Executive's signature. In both these senses enhanced rescission authority is a highly flexible tool for spending control.

V. MCMURTRY, *supra* note 55, at 15 (citing U.S. Executive Office of the President, Memorandum for the President from the Cabinet Council on Economic Affairs Re: Enhanced Authority to Limit Spending (Dec. 23, 1983)).

63. *See supra* note 61.

2. *Expedited Rescission*

Expedited rescission proposals have two components. First, they would require Congress to vote "yes" or "no" on the President's proposal, thus insuring that a rescission proposal from the President would not die because of congressional inaction. Second, they would require Congress to act within a shorter period of time.[64] Proponents of expedited rescission argue that Congress has dealt with rescission proposals primarily by inaction, and that expedited rescission would force Congress to respond to presidential budget concerns with an up-or-down vote.[65]

In the 100th and 101st Congresses, a number of bills that provide for expedited rescission were introduced.[66] Such bills typically would require the President to submit proposed rescissions to Congress within ten or fewer days after the signing of the appropriations bill. The bills then would require Congress to vote "yes" or "no" on the proposed rescission within a fixed number of days. One bill, for example, would require Congress to vote on the proposed rescission within ten calendar days of continuous session.[67]

Expedited rescission would diminish Congress' control over its own agenda. In addition, it would force at least one house of Congress to vote twice in support of funding for a program or purpose (i.e., once in favor of the original passage of the appropriations bill and once against the rescission proposal). Expedited rescission would weaken Congress' position in enforcing the Principle of Appropriation Expenditure and is therefore undesirable.

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64. Under current law, Congress has 45 days to complete action on a rescission proposed by the President, if it wishes the impoundment to occur. 2 U.S.C. §§ 683, 688 (1988).

65. V. MCMURTRY, *supra* note 55, at 16, 19. Expedited rescission would be part of a class of "fast-track" procedures that have been instituted in recent years to require Congress to vote up or down on a particular issue. Such procedures have been established primarily in statutes relating to foreign affairs and trade. *See* Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1332 n.358 (1988).

Fast-track procedures do not appear to be unconstitutional under *Chadha* because they require "bicameral action and presentment to the President, albeit on an expedited basis." *Id.*

Finally, "because fast-track procedures are simply statutory modifications in internal house rules, they are theoretically subject to change at any time by each house." *Id.*; *see* U.S. CONST. art. I, § 5, cl. 2 ("Each [h]ouse may determine the [r]ules of its [p]roceedings . . . .").

66. V. MCMURTRY, *supra* note 55, at 23. These include S. CON. RES. 16, 100th Cong., 1st Sess. (1987); S. 832, 100th Cong., 1st Sess. (1987); H.R. 2733, 100th Cong., 1st Sess. (1987); H.R. CON. RES. 45, 101st Cong., 1st Sess. (1989); S. CON. RES. 9, 101st Cong., 1st Sess. (1989).

67. S. CON. RES. 16, 100th Cong., 1st Sess. (1987). It is not clear from this or the bills currently proposed in Congress what would happen under expedited rescission if Congress failed to vote on a presidential rescission proposal.

III. EVALUATING THE CHALLENGES TO STANDING UNDER THE ICA

As seen above,[68] President Reagan argued that, under *Bowsher v. Synar*,[69] the Comptroller General may not sue to enforce the ICA. In addition, courts have ruled that frustrated potential recipients of funds may not bring suit to enforce the ICA.

This Part evaluates these challenges to the ICA and argues that (1) the Comptroller General may sue to enforce the ICA; (2) there is not, under current law, a private right of action to bring suit under the ICA; and (3) Congress should amend the ICA to create a private right of action and should expand the Comptroller General's standing to force the release of impounded funds.

A. *Standing for the Comptroller General*

In *Bowsher*, the Court ruled that an officer under the control of Congress did not have the constitutional authority to execute[70] the laws. The question in the case of the ICA is whether a congressional officer has the constitutional authority to bring suit, on behalf of Congress, in an Article III tribunal.

The Supreme Court has held that it is the role of the legislature to legislate, not to execute or adjudicate the laws.[71] What happens, however, when the executive branch chooses to disenfranchise the legislature by not executing the laws passed by the legislature? There are two possibilities. First, the legislature can apply political pressure to force the executive branch to execute the laws.[72] Second, courts have allowed individual members of Congress, a House of Congress, and agents of the Congress to bring suit when, by the executive branch's action or inaction, the effect of a law passed by Congress has been nullified. This option avoids the disadvantages of a purely political resolution (or no resolution at all) in cases where the executive refuses to carry out a law.

Such suits are not unconstitutional under *Bowsher*. Congress is not attempting to execute the laws either itself or through its agent, as was the case in *Bowsher*. Rather, Congress is merely bringing a lawsuit, through its agent, to

68. *See supra* text accompanying notes 57-58.

69. 478 U.S. 714 (1986).

70. The Court did not explicitly define "execute", but noted that "interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.* at 733.

71. *See* Bowsher v. Synar, 478 U.S. 714, 721-27 (1986); INS v. Chadha, 462 U.S. 919, 951 (1983).

72. Clearly, this is done in many circumstances. But this solution places the executive branch at an unfair advantage. Once all the negotiations have been completed on a particular bill or series of bills and a deal has been struck, the executive can then, perhaps months or years later, threaten not to execute the law unless Congress makes a new set of concessions on another issue. Alternatively, the executive can simply refuse to execute the law altogether. These actions may, of course, reduce the executive's credibility with Congress. Thus, such a ploy on the part of the executive would be most effective as part of an endgame (e.g., at the end of a President's term).

try to force the President to "take care that the laws be faithfully executed."[73]

The District of Columbia Circuit has articulated a number of different standards for whether individual members of Congress have standing to sue, sometimes allowing standing and sometimes not.[74] While one court has noted, "[i]t is somewhat difficult to reconcile the various cases on congressional standing in [the District of Columbia] Circuit,"[75] the thread running through all of these decisions is a concern by the courts that they not interfere in situations where a political remedy is possible or where one disgruntled legislator seeks to win a political battle through the courts that has been lost in the legislative chamber.

As defined in the ICA, the use of the Comptroller General to enforce the Principle of Appropriation Expenditure is a mechanism that meets the different standing requirements developed by each court in this line of congressional standing cases. The Comptroller General serves as the agent of the entire Congress, as an institution, not of a disgruntled member or group of members who lost an intramural political battle.[76] The Comptroller General must provide

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73. U.S. CONST. art. II, § 3. Implicitly, then, when Congress brings a lawsuit to regain control from the executive branch over its own lawmaking power, Congress is not engaging in the type of executive function that *Bowsher* prohibits. Such lawsuits are, in fact, a constitutional necessity: they enable Congress to maintain control over its lawmaking role.

74. In *Kennedy v. Sampson*, for example, the court recognized the standing of Senator Kennedy to challenge the constitutionality of a pocket veto on the ground that, if unconstitutional, the veto deprived the Senator of his vote. 511 F.2d 430, 433 (D.C. Cir. 1974). However, in *Harrington v. Bush*, the District of Columbia Circuit ruled that the plaintiff Congressman did not have standing to bring suit, because the court did not find injury-in-fact to the plaintiff himself. 553 F.2d 190, 199 n.41 (D.C. Cir. 1977).

In *Riegle v. Federal Open Market Committee*, the District of Columbia Circuit developed a doctrine of "equitable discretion" for members of Congress who seek relief in court. 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). This doctrine provided that "[w]hen a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, the court would be counseled . . . to hear the case." *Id.* at 882. The court then dismissed the case, because judicial action would have interfered with the legislative process, which offered the potential for legislative redress. Significantly, however, the court did write, "such actions as impeachment, expulsion proceedings, *impoundment*, and certain acts of the executive not subject to direct legislative redress or private party challenge . . . would be subject to judicial review in a congressional plaintiff case." *Id.* (emphasis added).

In Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987), the court again found sufficient grounds to grant standing to thirty-three individual members of the House of Representatives and for the Senate as an institutional body to challenge a pocket veto. The court did not, however, apply the doctrine of equitable discretion.

See generally Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986) (discussing different, conflicting standards used by courts and concluding that Congress, as an institution, possesses standing, while individual members generally do not).

75. Synar v. United States, 626 F. Supp. 1374, 1381 (D.D.C.), *aff'd sub nom.*, Bowsher v. Synar, 478 U.S. 714 (1986).

76. In *Kennedy*, the executive branch was willing to acknowledge the standing of either house of Congress, as an institution, to sue in order to preserve the congressional role in the lawmaking process. 511 F.2d 430, 435 (D.C. Cir. 1974) (citing Appellants' Reply Br. at 2). In *Barnes*, the court explicitly granted standing to the United States Senate, citing *Kennedy*. 759 F.2d at 25-26. Thus the use of the Comptroller General, to sue on behalf of the Congress as a whole, in order to enforce a law that has won the support of both houses of Congress, is consistent with the District of Columbia Circuit's decisions on standing.

Suits brought by the Comptroller General are not barred by the "political question" doctrine. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever

impoundment reports to both houses of Congress and may not file suit until twenty-five calendar days after notifying legislative leaders of her intent to file suit.[77] This provision presumably gives the legislative leaders time to work out political compromises with the executive branch and determine whether they want to bring suit.

Thus, contrary to the assertion made by President Reagan in his signing statement for the amendments to the ICA,[78] the Comptroller General should be able to sue the executive branch under the ICA. The Comptroller General does not assume executive authority, but rather is acting as an agent for the Congress, as an institution. As such, the Comptroller General is bringing suit under those conditions where courts have found congressional standing to be constitutional.[79]

B. *Standing for Frustrated Potential Recipients of Funds*

The court in *Public Citizen v. Stockman*[80] found that "Congress did not intend to create a private right of action to police against transgressions of the [ICA] by the executive."[81] Citing *Transamerica Mortgage Advisors, Inc. v. Lewis*,[82] the court noted that the most important question to be answered in determining whether a private right of action exists is whether it was the intent of Congress to create a private remedy for violation of a particular statute.[83] The court then went on to find that there was nothing in the language or legislative history of the ICA indicating that Congress intended to create a private right of action.[84]

The court was correct, both in its interpretation of the case law relating to a private right of action[85] and in its interpretation of legislative intent behind the ICA. As is clear from *Transamerica*, congressional intent is a key factor in determining whether a particular statute has created a private right of action. There is no convincing evidence in either the text of the ICA itself or in its legislative history to support the contention that Congress intended to create

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authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution."). The "political question" doctrine, which applies in cases where the courts should not intrude into legislative or executive decisionmaking, does not apply when one branch of government has exceeded its constitutional authority at the expense of another branch (e.g., when the President impounds without congressional approval).

77. *See supra* note 31.

78. *See supra* text accompanying notes 57-58.

79. The Comptroller General is also authorized to bring a civil action to require the head of an executive agency to provide access for the Comptroller General to agency records relating to the "duties, powers, activities, organization, and financial transactions of the agency." 31 U.S.C. § 716(a) & (b) (1988).

80. 528 F. Supp. 824 (D.D.C. 1981).

81. *Id.* at 827.

82. 444 U.S. 11 (1979).

83. *Stockman*, 528 F. Supp. at 827.

84. *Id.* at 828-30.

85. *See* Cort v. Ash, 422 U.S. 66, 78-80 (1974).

a private right of action under the ICA.[86] Thus private parties may not bring suit under the ICA.

C. *Toward an Expansion of Standing*

This section examines the tools that are available for controlling executive impoundments under current law. It also argues that Congress should amend the ICA to make more tools available to enforce the Principle of Appropriation Expenditure.

1. *Impoundments that Do Not Fall Under the ICA*

As discussed above, there have been suits which were brought prior to passage of the ICA and some which were brought after passage of the ICA, where the plaintiffs did not rely on a violation of the ICA as a basis for their suit. *Train* (suit brought by municipalities in the State of New York), *Volpe* (suit brought by Missouri, with amicus curiae brief filed by twenty-seven members of Congress), and *National Association of Counties v. Baker* (suit brought by associations of counties, cities and mayors and ten individual cities and counties) were all brought by potential recipients of funds.

No case has clearly held that members of Congress or a congressional agent can sue for release of funds based solely on the terms of an authorization statute (i.e., in cases where the ICA does not apply). In *Dabney v. Reagan*,[87] members of Congress, individuals, cities and public interest groups brought suit against members of the executive branch. The court did not rule on whether the members of Congress had standing, but did write, "I am satisfied . . . that someone in the plaintiffs' ranks has the requisite standing."[88]

It may or may not be appropriate for a single member of Congress or group of members of Congress to bring suit to force release of impounded funds.[89] However it is appropriate for an agent of Congress, as a body, to bring suit to force release of impounded funds, even in those cases that fall outside the ICA. For this reason, Congress should amend the ICA to make clear that the Comptroller General may bring suit to force release of impounded funds not just in cases that fall within the ICA, but also in those not covered by the ICA.

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86. *See Stockman*, 528 F. Supp. at 827-30. *But see* Mills & Munselle, *supra* note 6, at 24 EMORY L.J. 313, 339-41 (1975) (arguing that under certain circumstances private parties and states do have standing to sue under ICA).

87. 542 F. Supp. 756 (S.D.N.Y. 1982).

88. *Id.* at 763.

89. *See supra* text accompanying notes 74-75.

2. *Impoundments that Fall Under the ICA*

Although such a case has never actually been decided, this Note has argued[90] that authorizing the Comptroller General to bring suit under the ICA is a statutorily and constitutionally valid tool for enforcing the Principle of Appropriation Expenditure. However, under the rationale of *Public Citizen v. Stockman*,[91] private parties currently may not bring suit under the ICA. Congress should amend the ICA to allow private suits to be brought to require the release of funds incorrectly impounded under the ICA.

Two courts in the post-ICA era have allowed private suits to force the release of impounded funds.[92] However in each case, the court found that the President was not subject to the structure of the ICA. In one case, *National Association of Counties v. Baker*,[93] the issue presented was the interpretation of the Gramm-Rudman Act. In the other case, *Dabney v. Reagan*,[94] the court noted that the ICA did not apply to the appropriations in question because the authorizing act made the appropriations mandatory.[95]

But what happens when the President uses the structure set up in the ICA (e.g., submitting a rescission message to Congress) and then impounds illegally, by withholding funds, despite the lack of a vote by Congress in favor of a rescission bill? By amending the ICA, Congress should allow private parties who are frustrated potential recipients of funds to sue under such circumstances.

Such an amendment would be valuable in enforcing the Principle of Appropriation Expenditure, because once Congress has authorized and appropriated funding for a program, potential recipients of funds have a strong interest in insuring that funding is made available. The leadership of Congress, with whom the Comptroller General would presumably consult in deciding whether to bring a suit, may not have the same direct interest in making funds available.

The court in *Public Citizen v. Stockman* argued that by allowing a private right of action under the ICA, "Congress would be stripped of its primary control over the resolution of executive-legislative budgetary disputes."[96]

There are two responses to this argument. First, Congress still maintains primary control. If Congress wishes that appropriated funds be impounded for any reason, it simply needs to pass a bill rescinding or deferring the funding. Second, once an appropriation bill has become law, it is not clear why the leadership of Congress should be able to acquiesce in negating an appropriation

90. *See supra* text accompanying notes 70-79.
91. 528 F. Supp. 824 (D.D.C. 1981).
92. *See supra* notes 42-50 and accompanying text.
93. 669 F. Supp. 518 (D.D.C. 1987).
94. 542 F. Supp. 756 (S.D.N.Y. 1982).
95. *See supra* note 49 and accompanying text.
96. *Stockman*, 528 F. Supp. at 830.

that was passed by both houses of Congress and signed by the President. Without a private right of action, the congressional leadership can do just that.

In summary, Congress should amend the ICA to (1) allow the Comptroller General to act as the agent for Congress in bringing suit to force release of impounded funds in situations not covered by the ICA and (2) allow a private right of action in bringing suits under the ICA.

CONCLUSION

From the presidency of Thomas Jefferson until the Nixon Administration, presidential impoundments were generally resolved through political channels. President Nixon tried to change the rules of the impoundment game, by ignoring political pressure and claiming that he possessed a constitutional and statutory right to impound. This led to two types of response. First, frustrated potential recipients of funds brought suit to force release of impounded funds, based upon statutory interpretations of the particular budget authorization bills and the Principle of Appropriation Expenditure. Second, Congress passed the ICA, which was intended to reassert congressional control over the budget.

However, if various commentators (including President Reagan, the courts and academics) are correct, the current version of the ICA is a toothless act because (1) the Comptroller General may not sue to enforce the ICA and (2) private rights of action are not permitted under the ICA.

This Note has argued that the commentators are incorrect in the first assertion and correct in the second. The Comptroller General, as an agent of Congress, may sue to enforce the ICA. But the law, as currently written, does not allow for private rights of action. Congress should amend the ICA in order to ensure more fully that the Principle of Appropriation Expenditure will be upheld. Specifically, Congress should provide for a private right of action under the ICA and should expand the Comptroller General's role to include bringing suit to force release of impounded funds not covered by the ICA. By doing so, Congress will have put in place the tools for best enforcing the Principle of Appropriation Expenditure. Furthermore, Congress should reject calls for enhanced and expedited rescission. Enhanced rescission gives the President far greater discretion to determine spending than a line-item veto and would greatly limit Congress' power to enforce the Principle of Appropriation Expenditure. Expedited rescission, while less extreme than enhanced rescission, would also diminish Congress' control over the budget by forcing at least one house to vote a second time in favor of funding a given initiative.

The Impoundment Control Act was a valuable first step in providing for better enforcement of the Principle of Appropriation Expenditure. By amending the ICA, as recommended in this Note, and defeating proposals for enhanced and expedited rescission, Congress can insure that the President does not violate the principle of separation of powers by expropriating the power of the purse.